necessary to achieving those benefits. Respondents' approach would fundamentally alter the established inquiry.

Respondents complain (Resp. Br. 12, 16) that "no efficiencies, cost savings, or competitive benefits" resulted from the alleged price fixing and that the venture "could have functioned . . . perfectly well" without it. But respondents cite no authority for the proposition that joint venturers must show that the particular manner in which the venture conducts its business is "necessary." As discussed in our opening brief (at 36), any such standard would wreak havoc on joint ventures, because it would be virtually impossible to show that charging one price is any more "necessary" than charging any other price—or that selecting one output level, or one particular supplier, is any more "necessary" than selecting a different one. Respondents have no answer for this point. Nor do they suggest any reason why Equilon's pricing would be any less subject to *per se* condemnation under their approach if Equilon had adopted a different pricing strategy. To the contrary, their argument that no cost savings resulted from charging the same price would apply equally to any pricing strategy that Equilon might have adopted. Rather, under respondents' approach, the only apparent means by which petitioners could have avoided *per se* condemnation would have been to remove the pricing function from Equilon and effectively unwind the entity as a marketing venture. If this approach were accepted, not only would Section 1 scrutiny be applied where none is justified, the governing rule of reason standard for evaluating a venture's formation would also effectively be supplanted with a *per se* rule of illegality for marketing of a joint venture's products.

Respondents quote the Ninth Circuit's suggestion that the result might be different if petitioners had merged their brands into "one collective brand." Resp. Br. 49 (quoting Pet. App. 27a). But this assertion only confirms the irrationality of respondents' position—and its lack of connection to any valid antitrust policy. If competition were

thwarted by selling gasoline under two brands at the same price, it would be equally thwarted by selling gasoline under a single brand at a single price. Either way, petitioners would be agreeing on the price of gasoline that was sold. Despite respondents' disclaimer, there is no logical stopping point for their argument. It would unavoidably preclude joint ventures from setting selling prices for their own products, and thus effectively ban beneficial, efficiency-enhancing collaborations that are vital to the economy. *See Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985) ("The war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.").

II. PRICING OF A JOINT VENTURE'S OWN OUTPUT BY THE VENTURE OR ITS OWNERS IN A MARKET IN WHICH THE OWNERS DO NOT COMPETE IS NOT CONCERTED ACTION SUBJECT TO SECTION 1.

As part of their erroneous effort to apply the *per se* rule to the pricing of a joint venture's output by the venture or its owners, respondents urge (Resp. Br. 22-31) that joint ventures like Equilon are really not single entities and thus should not be treated as such for antitrust purposes. This argument is also flawed at every turn.[1]

---

[1] Contrary to respondents' assertion, petitioners argued in the court below that Section 1 should not be applied here (*e.g.*, Appellees' Brief, filed January 30, 2003, at 18, 21; Petition for Rehearing, filed January 22, 2004, at 2, 14), and the court of appeals ruled on the issue (Pet. App. 19a-20a n.11). Indeed, the applicability of Section 1 is precisely the issue that divided the majority and the dissent below. *Compare* Pet. App. 6a & n.4, 19a n.11 (majority op.) (finding concerted action), *with id.* at 31a (Fernandez, J., dissenting) (concluding that Equilon should be viewed as "a separate entity"). Petitioners also made this argument in the

A. This Court Has Not Applied Section 1 To A Joint Venture's Operation In A Market In Which Its Owners Do Not Compete.

Respondents point out that this Court has a "long history of applying the antitrust laws to joint ventures." Resp. Br. 23. That is of course true, and the antitrust laws have been applied to this venture—*i.e.*, when the FTC and the states reviewed its formation and found it to be permissible. But the antitrust laws have not been applied to regulate the pricing decisions or other operational activities of joint ventures—at least not in the manner respondents urge here.

The Court's joint venture cases have involved either scrutiny of the venture's formation, *e.g.*, *Timken*, 341 U.S. 593, or scrutiny of a restraint on non-venture conduct or conduct in a market in which the venture owners remained in competition. *E.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985); *NCAA*, 468 U.S. 85; *Maricopa County*, 457 U.S. 332; *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978). None of these circumstances is at issue in this case.

All that is at issue here is an integrated joint venture's operation of its own business in a market in which the venture owners no longer compete. None of this Court's precedents has applied Section 1 in this context. Indeed, the Court concluded just the opposite in *Maricopa County*, where it observed that a joint venture consisting of companies that have "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the

---

petitions for certiorari (Texaco Pet. 10-13, 18-22; Shell Pet. 15-16), and respondents did not assert in their opposition that the argument had not been presented below. Any contention that petitioners' argument is not properly before this Court is thus erroneous and has been waived. *See, e.g.*, Sup. Ct. R. 15.2; *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998).

market," with the result that "a price-fixing agreement among the [partners] would be perfectly proper." 457 U.S. at 356-57.

Contrary to respondents' argument (Resp. Br. 22), this is not a matter of according joint ventures "special antitrust status." Rather, it is simply applying to joint ventures the same Section 1 standards that apply to all firms. Section 1 applies only to conduct that involves "a sudden joining of two independent sources of economic power previously pursuing separate interests"—a "merging[] of resources" that "increases the economic power moving in one particular direction." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 771 (1984). When two firms have already combined their businesses and no longer compete in the relevant market, a decision about the prices the new entity will charge for its products is not a "merging of resources" and has no effect on economic power. It is merely the operation of the new entity's validly formed business. While Section 1 applies to the formation of the joint venture, it does not apply to the ongoing operation of the entity once formed.

B. Applying Section 1 To A Venture's Ongoing Operational Decisions Would Frustrate, Not Further, Sound Antitrust Enforcement.

In response, respondents assert (Resp. Br. 29) that "sound public policy" supports applying Section 1 here. But they have no coherent response to the point that subjecting a joint venture's ongoing daily operations to separate antitrust scrutiny would be completely unworkable. While they assert (*id.* at 28) that identifying which joint venture activities should be treated as concerted action and which should not would be more difficult than just calling everything concerted action, the distinction in the Sherman Act between concerted action and single firm conduct is well-established and exists for an important reason: business decisions that do not restrain otherwise existing competition do not

threaten competition, which is best served by allowing businesses to operate without fear of their "every action [being subjected] to judicial scrutiny for reasonableness." *Copperweld*, 467 U.S. at 775. *See* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1462, at 192 (2d ed. 2003) ("[S]ubjecting virtually every decision made within a single firm to Sherman Act § 1 scrutiny would not only overtax the limits of our antitrust enforcement institutions, it would also involve judges and commissioners with the daily business decisions of every firm.").

Contrary to respondents' argument (Resp. Br. 30), recognizing that Section 1 does not apply to a joint venture's conduct of its own business does not mean that antitrust enforcers must "anticipate every conceivable restraint in which the venture could engage post-formation." *Id.* If the venture participants later change the scope of their venture, or adopt new restrictions on their non-venture conduct, such decisions would be subject to Section 1 scrutiny on the same basis as the original formation decisions. But there is no need for separate Section 1 scrutiny of the ongoing operation of the business that the venture was formed to conduct—nor for antitrust regulators to try to predict the specific pricing strategy that the joint venture may adopt or the output decisions that it may make. The protection against any anticompetitive consequences flowing from such pricing or output decisions is not ongoing scrutiny of those individual decisions for "reasonableness." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.) ("antitrust courts normally avoid direct price administration"). Rather, the protection against any such anticompetitive consequences is the rigorous evaluation of market conditions in which the business will operate that is part of a traditional rule of reason assessment of the permissibility of the joint venture in the first place. Here, the FTC and the states performed just such a rigorous evaluation when, applying the standards of Section 1 of the Sherman Act and Section 7 of the Clayton Act, they examined the

markets in which Equilon would operate and concluded that (with certain divestitures) Equilon would lack the ability to engage in supracompetitive pricing. VII *Antitrust Law* ¶ 1464, at 214 ("legal permission for a particular merger under the rather stringent prophylactic standards of Clayton Act § 7 necessarily expresses the judgment that the merger presents an insufficient anticompetitive threat to warrant condemnation"); *see* U.S. Br. 17 (confirming that, in reviewing Equilon's formation, the "FTC applied the antitrust enforcement standards that the Justice Department and the FTC apply to mergers").

The lack of merit in respondents' position is perhaps best illustrated by their assertion that, if petitioners had wanted to avoid lawsuits like this one, "they could have merged, as they well knew." Resp. Br. 31. Respondents thus concede that it would have been perfectly lawful for a merged company to decide to charge the same price for Shell- and Texaco-branded gasoline. The competitive consequences of that situation, however, would be no different from what actually occurred here—except that a complete merger would have eliminated competition between Shell and Texaco to an even greater degree by extending to other markets beyond just domestic gasoline. The antitrust laws do not and should not prefer mergers to joint ventures; and they certainly should not be construed to provide unnecessary incentives for the elimination of competition where economic benefits do not warrant it.

III. NEITHER THE COMPETITION BETWEEN SHELL AND TEXACO IN OTHER MARKETS NOR THE POTENTIAL UNWINDING OF THE VENTURE, NOR THE NON-COMPETE AGREEMENTS, JUSTIFY APPLYING EITHER SECTION 1 OR THE *PER SE* RULE TO THE PRICING OF EQUILON'S PRODUCTS.

In arguing for the application of both Section 1 and the *per se* rule, respondents point out (Resp. Br. 24-27, 31-32)

that Shell and Texaco did not end competition between themselves in other markets, that the venture could be unwound, and that Shell and Texaco entered into non-compete agreements with respect to the market in which Equilon was to operate. From these facts, respondents assert (Resp. Br. 32) that the pricing of Equilon's own products might facilitate "collusion and pricing uniformity" regarding Shell's and Texaco's non-venture products or their own gasoline upon the venture's termination, or otherwise justify application of Section 1 and the *per se* rule to the pricing of Equilon's products. This argument is also unsound.

First, in advancing this argument, respondents abandon the Ninth Circuit's reasoning. The Ninth Circuit concluded that Section 1 applies here, not because of any competition between Shell and Texaco in other markets, but because Shell and Texaco supposedly "agreed in advance" of Equilon's actual formation on the pricing for the two brands. Pet. App. 19a n.11. For the reasons explained in our opening brief (at 23-24), that ruling was erroneous; and, by now focusing on arguments about other markets and products or on the non-compete agreements, respondents are revealing that they understand they cannot defend that ruling.

Second, respondents presented no evidence that pricing decisions about domestic gasoline had any relation to, or any potential to affect, pricing of such disparate products as marine lubricants, sulfur, heavy fuel oils, coke or any of the other products Shell and Texaco sold outside the venture. Nor is there any evidence suggesting that pricing during the venture had any effect on—or potential to affect—post-venture gasoline pricing. On these and other issues, respondents and their amici argue as though the case had been dismissed on the pleadings, rather than the district court having granted summary judgment after full discovery on all liability issues. The question at this stage is not what respondents might have proved; rather, the question is what they in fact proved by sufficient evidence to withstand summary judgment.

Third, even if there were evidence (or reason to believe) that pricing of the joint venture's products could affect pricing of non-venture products, that would not be a proper basis for applying Section 1 to the pricing of Equilon's products—and certainly not for condemning it as *per se* illegal. The alleged adverse effect on competition does not flow from any decision to charge any particular price; the supposed adverse effect would exist regardless of whether Equilon charged the same or differing prices for the two brands. Either way, Equilon or its owners would be establishing relative prices for the gasoline, which price would then (under respondents' theory) be a basis for "facilitating" similar pricing of other products. The issue, then, is not how Equilon priced its gasoline, but rather whether it was proper for Equilon (or its owners) to set any price at all for that gasoline—*i.e.*, whether Equilon could legitimately be formed as both a production *and* marketing venture. While that question may be subject to Section 1 scrutiny, the scrutiny is not of the propriety or "necessity" of any particular pricing decision (as respondents urge and the Ninth Circuit held). Nor would the question be evaluated under the *per se* rule. The inquiry would instead be a rule of reason inquiry into the propriety of Equilon's formation as a marketing venture, under which any anticompetitive effects must be proved (not conjectured) and carefully balanced against the procompetitive benefits created by the venture (which are unchallenged here). *Cf. Copperweld*, 467 U.S. at 768. That is precisely the inquiry that the FTC and four state attorneys general conducted at the time that Equilon was formed. Neither court below questioned the validity of Equilon's formation as a marketing venture, and respondents expressly abandoned below any challenge under the rule of reason, whether to the venture's formation or otherwise.

Fourth, respondents also apparently still assert (Resp. Br. 33) that setting the same price for the two brands restrained competition between the brands while the venture was in existence. But that is the very intra-enterprise conspiracy

theory that this Court rejected in *Copperweld*. The competition with which Section 1 is concerned is competition between "independent sources of economic power," *Copperweld*, 467 U.S. at 771, not competition between brands under the exclusive control of a single entity. *See* U.S. Br. 14. Once the decision to combine the two brands under common ownership is found permissible, no legitimate antitrust purpose is served by subjecting the daily pricing behavior of the combined entity to continual scrutiny. If respondents' theory of competition and antitrust law were accepted, validly merging companies that wish to continue to use their existing brand names could always be required to maintain competition between those brands. That is not the law, nor should it be. *See* W. Stephen Smith, *Can a Fully Integrated Joint Venture Be Per Se Unlawful,* 19 Antitrust 52, 55 (Spring 2005) ("A decision by Equilon and Motiva to charge the same price for Shell and Texaco gasoline is no different than a decision by Hewlett-Packard to charge the same price for HP and Compaq brand computers.").

Fifth, the fact that Equilon could be terminated (and later was terminated as a joint venture when Texaco merged with Chevron) does not change this analysis. The expected duration of the venture is relevant in a rule of reason analysis of the venture's formation, since a venture scheduled to last only for a brief period might not be able to achieve real efficiencies that could outweigh any potential anticompetitive consequences. But if the venture is valid under the appropriate rule of reason analysis (both the FTC and the district court so found here, *see* U.S. Br. 14 n.8; Pet. App. 58a-59a, and respondents below abandoned any contrary claim), the fact that the venture may later be unwound does not justify any further Section 1 scrutiny—just as it would not justify further Section 1 scrutiny of the internal operation of a merged company (which can also be unwound). Once validly formed, joint ventures (and merged companies) must be free to conduct their validly formed businesses as would other entities. *See also* VII *Antitrust Law* ¶ 1475, at 304

("[O]nce antitrust law deems the creation of an organization to be lawful, it would be inconsistent to prevent it from functioning by characterizing its normal operations as *per se* or otherwise unlawful conspiracies.").

Finally, contrary to respondents' argument, there is no legal basis for suggesting (Resp. Br. 24) that the non-compete agreements are themselves *per se* illegal. Shell and Texaco did not merely agree to not compete with each other while remaining independent participants in the relevant market without any integration. Instead, their non-compete agreements accompanied their valid efficiency-enhancing integration of all of their domestic gasoline refining and marketing assets. In such circumstances, non-compete agreements are both normal and the classic example of an ancillary agreement that is not illegal *per se* but instead evaluated under the rule of reason. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988) ("The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market."). Respondents disclaimed any such challenge when they abandoned any rule of reason claim below. *See* Pet. App. 7a ("plaintiffs disclaimed any reliance on the traditional 'rule of reason' test").

IV. THE ALTERNATIVE "QUICK LOOK" ARGUMENTS OF RESPONDENTS AND THEIR AMICI ARE MERITLESS.

Respondents and their amici alternatively assert that at least "quick look" analysis should be applied. Resp. Br. 41; AAI Br. 10-23. These arguments are similarly meritless.

A. Equilon's Operation Was Not Obviously Anticompetitive.

"Quick look" treatment requires that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). There must

be a "great likelihood of anticompetitive effects [that] can easily be ascertained." *Id.* Respondents do not and cannot come close to meeting that standard.

There is no reason to imagine here, much less any evidence, that the pricing of a joint venture's own product (whether at the same or different prices) will have any anticompetitive effect—let alone that there is a "great likelihood" of such an effect. The FTC reached just the opposite conclusion when, after an extensive investigation, it permitted the venture to be formed as a production and marketing venture conditioned on limited divestitures which "alleviate[d] the alleged competitive concerns arising from the Joint Venture." FTC, *Analysis to Aid Public Comment,* 62 Fed. Reg. 67,868, 67,869 (Dec. 30, 1997). Since there is no basis for suggesting that the federal government's designated antitrust enforcement agency for this transaction (along with the attorneys general of four states) lacks a "rudimentary understanding of economics," it is hard to imagine a less likely candidate for "quick look" treatment than this joint venture.

Respondents' attempted analogy to Professor Areeda's hypothetical joint selling arrangement between GM and Ford, Resp. Br. 20-22, only confirms this point. Professor Areeda's argument was that the formation of such a venture would be unlawful because it would merely be a vehicle for establishing the price for separately produced and owned goods, without achieving any meaningful efficiencies. The hypothesized venture did not involve any integration or sharing of risk. Here, by contrast, Equilon was a full integration of Shell's and Texaco's production and marketing operations that was reviewed at length by federal and state regulators and found proper. "Quick look" is inapplicable.

Quick look liability is also improper even if, as the American Antitrust Institute ("AAI") urges, respondents could be thought to be challenging the Brand Management

Protocol, rather than the specific prices that Equilon charged. The AAI asserts that the Brand Management Protocol, which merely established the conditions under which the Shell and Texaco brands were licensed to Equilon, imposed an "unduly restrictive structure" on Equilon that impaired Equilon's "ability to compete in the market" by preventing it from pursuing a profit-maximizing strategy. AAI Br. 4, 16. There is of course no evidence that the Brand Management Protocol had anything to do with the decision about how Equilon's products would be priced or that, if it did, Equilon's pricing strategy was not in fact profit maximizing. But, even if there were such evidence, it would still not support a claim that the Brand Management Protocol or Equilon's pricing was anticompetitive, let alone so obviously anticompetitive that it could be condemned on a quick look basis without full analysis.

Numerous companies pursue business strategies that may not always maximize their profits. That does not mean that a company's operation is anticompetitive or that the strategy violates the antitrust laws. Nor, in the case of a joint venture, does it mean that the venture is invalid as not being sufficiently "efficient" or "vigorous" (AAI Br. 6, 12) in its behavior. Unless the venture possesses market power (and the FTC and four state attorneys general concluded that, as formed, Equilon would not), any internal constraints on its operational decisions—whether "unduly restrictive" or otherwise not "profit-maximizing"—would at most harm only the venture, not competition. If respondents wished to argue otherwise, it was their burden to adduce evidence proving as much. They did not do so.

The AAI's unsupported speculation (AAI Br. 6, 17) that the Brand Management Protocol was adopted (and may have been applied) to protect the venture owners' interests outside the venture is similarly irrelevant. Even if that were true, there would be nothing obviously anticompetitive about venture owners acting to preserve the value of their assets outside the venture. To the contrary, it is just as likely that

doing so would have "a net procompetitive effect, or possibly no effect at all on competition." *Cal. Dental*, 526 U.S. at 771.

B. Respondents Have Not Shown Any Actual Anticompetitive Effects.

Finally, respondents err in suggesting (Resp. Br. 45) that "demonstrable anticompetitive market effects" exist here because gasoline prices rose in early 1999. They presented no evidence that the price increases had anything to do with Equilon or its pricing strategies. They assert only that crude oil prices were stable or dropping at that time. Even if that were true, however, gasoline prices are not merely the product of crude oil costs but are affected by numerous other variables, including consumer demand and refining and transportation constraints. Respondents have not attempted to control for these variables; and thus the inferences that they seek to draw are legally spurious ones. Indeed, federal investigators examining the 1999 West Coast price increases concluded that they were primarily the result of disruptions in supply caused by a refinery explosion in Northern California and subsequent outages in three other California refineries. *See* U.S. General Accounting Office, *Motor Fuels: California Gasoline Price Behavior*, at 12-13 (April 2000). In short, because there is no proof that the market-wide price increases were causally linked to the internal pricing decisions of a single actor in that market, the price increases to which respondents point are legally meaningless. *Cf.* XI H. Hovenkamp, *Antitrust Law* ¶ 1914, at 351 (2d ed. 1998) ("[I]n any case where proof of an output reduction substitutes for a showing of power, causation must be established. The mere fact that output declines after a restraint has been put in place does not mean that the restraint contributed in any way to the output reduction.").

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

ROBERT A. MITTELSTAEDT
CRAIG E. STEWART
(Counsel of Record)
MARTHA BOERSCH
JONES DAY
555 California St., 26th Floor
San Francisco, CA 94104
(415) 626-3939

JOE SIMS
GLEN D. NAGER
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner
Texaco Inc.

December 15, 2005

Supreme Court, U.S.
FILED
SEP 12 2005
OFFICE OF THE CLERK

Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER
v.
FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER
v.
FOUAD N. DAGHER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
THOMAS O. BARNETT
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
ADAM D. HIRSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of Argument 7
Argument 10
An agreement between the owners of a legitimate joint venture respecting the pricing of the joint venture's products is not subject to per se condemnation 10
A. The court of appeals improperly extended per se analysis to an agreement that does not restrain competition 10
B. The court of appeals erred by invoking the ancillary restraints doctrine in this case 21
C. The court of appeals' result is inconsistent with the procompetitive purposes of the antitrust laws 28
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Addamax Corp. v. *Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998) 23
Arizona v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) 13, 16, 19
Blackburn v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995) 25

Cases—Continued: Page

BMI v. *CBS, Inc.*, 441 U.S. 1 (1979) 9, 11, 13, 15, 16, 20, 26
Business Elecs. Corp. v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) 11, 22
California v. *American Stores Co.*, 495 U.S. 271 (1990) 16
California Dental Ass'n v. *FTC*, 526 U.S. 756 (1999) 21
Chicago Prof'l Sports Ltd. P'ship v. *NBA*, 961 F.2d 667 (7th Cir.), cert. denied, 506 U.S. 954 (1992) 20
Citizen Publishing Co. v. *United States*, 394 U.S. 131 (1969) 19, 20
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 7, 10, 11, 29
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 8, 12, 14, 19
Dr. Miles Med. Co. v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911) 15
FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) 11, 21
Freeman v. *San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), cert. denied, 540 U.S. 940 (2003) 26
General Leaseways, Inc. v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) 25
Los Angeles Mem'l Coliseum Comm'n v. *NFL*, 726 F.2d 1381, 1395 (9th Cir.), cert. denied, 469 U.S. 990 (1984) 22

Cases—Continued: Page

National Bancard Corp. v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986) 26

National Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 23

NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 11, 18, 20, 21

NFL v. *North Am. Soccer League*, 459 U.S. 1074 (1982) 25

New York v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995) 16

Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1 (1958) 11

Polk Bros., Inc. v. *Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) 23,.25

Polygram Holding, Inc. v. *FTC*, No. 03-1293, 2005 WL 1704732 (D.C. Cir. July 22, 2005) 21, 28

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987) 22, 23, 25, 28

SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995) 24

Shell Oil Co., In re., 125 F.T.C. 769 (1998) ... 1, 4, 5, 8, 18

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 11, 30

Stop & Shop Supermarket Co. v. *Blue Cross & Blue Shield*, 373 F.3d 57(1st Cir. 2004) 28

Sullivan v. *NFL*, 34 F.3d 1091 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995) 24

Cases—Continued: Page

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 16

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) 22, 23, 24

United States v. *Citizen Publ'g Co.*, 280 F. Supp. 978 (D. Ariz. 1968) 20

United States v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) 24

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 29

United States v. *Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004) 24

Statutes:

Clayton Act, § 7, 15 U.S.C. 18 ..... 4, 20

Robinson-Patman Act, 15 U.S.C. 13 7

Sherman Act, § 1, 15 U.S.C. 1 *et al.* 2, 5, 11, 12, 14, 19

Miscellaneous:

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965) 22

Chevron Corp., In re, No. C-4023 (FTC Jan. 2, 2002)<www.ftc.gov/os/2002/01/chevronorder.pdf> 3

Miscellaneous—Continued: Page

DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> 14, 17, 23, 29

FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997) 1, 11, 17

FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. (2001):

p. 48,143 3

7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 16

Herbert Hovenkamp, *Antitrust Law* (2d ed. 2005):

Vol. 11 22

Vol. 13 ..... 15, 17, 29

In the Supreme Court of the United States

No. 04-805

TEXACO, INC., PETITIONER

v.

FOUAD N. DAGHER, ET AL.

No. 04-814

SHELL OIL COMPANY, PETITIONER

v.

FOUAD N. DAGHER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission (FTC) have primary responsibility for enforcing the federal antitrust laws. The FTC reviewed the transaction that created the joint ventures at issue in this case. See *In re Shell Oil Co.*, 125 F.T.C. 769 (1998); FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). More generally, the agencies share a strong interest in the proper application of the per se rule in civil and, in the case of the Department of Justice, criminal enforcement proceedings.

STATEMENT

Petitioners Shell Oil Co. (Shell) and Texaco, Inc. (Texaco) formed two joint ventures to combine the refining and marketing of their gasoline products within the United States. Respondents, a class of 23,000 gas station owners, brought a suit alleging that petitioners violated the antitrust laws by agreeing that each joint venture would unify its pricing of the Shell and Texaco brands of gasoline sold by the venture. Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court rejected that theory of liability and granted summary judgment in favor of petitioners, but the court of appeals, in a divided decision, reversed. See Pet. App. 1a-33a, 46a-69a.[1]

1. Petitioners were once "fierce competitors" in all aspects of the oil and gasoline markets. Pet. App. 3a. In 1998, however, they formed a "nationwide alliance" through two wholly owned joint ventures that encompassed their "downstream" operations (i.e., those operations relating to the refining, distribution, and sale of gasoline) in the United States. *Id.* at 3a-4a. Petitioners formed Equilon Enterprises to refine, transport, and market Shell and Texaco gasoline products in the western United States. *Id.* at 4a. Together with a third joint-venture partner, they formed Motiva Enterprises to assume the same responsibilities in the eastern United States. *Ibid.*[2] Petitioners transferred all of their

---

[1] "Pet. App." refers to the petition appendix in No. 04-805.

[2] The district court granted summary judgment to the third joint-venture partner because none of the named respondents had ever purchased gasoline from Motiva. Pet. App. 40a. The court of appeals affirmed on that point. *Id.* at 10a-12a. Accordingly, the balance of this

domestic downstream assets to those joint ventures and ceased competing in the downstream U.S. markets. *Id.* at 5a, 37a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, those operations involving the exploration and production of crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand." *Id.* at 5a; see *id.* at 58a.[3]

Under the terms of the consummated alliance, petitioners granted Equilon an exclusive license to sell gasoline under their brand names in Equilon's geographic region. Although the Texaco and Shell brands maintained their "own unique chemical composition (the gasoline is differentiated by separate packages of 'additives'), trademark, and marketing strategy," Pet. App. 6a-7a, both brands were sold exclusively by Equilon. At

---

brief primarily addresses Equilon, although the same analysis would apply equally to its sister venture, Motiva.

[3] Shell has since bought out Texaco's interest in Equilon and Motiva, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) <http://www.ftc.gov/os/2002/01/chevronorder.pdf>. The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,143 (2001).

some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. *Id.* at 6a.

Petitioners provided as part of their alliance that Equilon's profits (or losses), as well as Motiva's, would be divided between petitioners in a fixed ratio based on the assets each contributed to the ventures. Pet. App. 5a. Thus, each petitioner's returns were determined by the ventures' total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. Each joint venture was terminable by mutual consent at any time, or unilaterally after five years (subject to specified notice provisions). *Ibid.*

The FTC and four western state attorneys general investigated the transactions. Pet. App. 5a. The FTC issued a complaint alleging that the combinations, as originally proposed, would violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition." 15 U.S.C. 18. See *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent undue concentration in certain downstream markets, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

2. The district court granted petitioners summary judgment, holding in relevant part that respondents had "failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason